

COVID-19 and Labour Law: Australia

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Abstract

The Australian regulatory response to the COVID-19 pandemic has arisen from high levels of cooperation between all levels of government, the Australian Council of Trade Unions (ACTU) and key business groups. The impacts of business closures and restricted operations are already being seen through widespread stand downs and layoffs of workers. A wage subsidy scheme for affected employees has been implemented but leaves out many casual and migrant workers. Norms of workplace regulation have been rapidly adapted to allow businesses to adjust operations and many employees to work from home. Overwork and workplace safety remain of concern for those in essential sectors.

Keywords: Covid-19; Labour Law; JobKeeper scheme; Income support; Home working; Stand downs; Pandemic leave.

1. General Framework.

As the COVID-19 emergency began to take hold in Australia throughout March 2019, federal and state governments responded with increasingly strict measures to prevent the spread of the virus and protect the community. The Australian Government declared the existence of a human biosecurity emergency on 18 March¹. State governments around the country declared a state of emergency within their jurisdictions². The restrictions that followed began with Social Distancing Guidelines³, moving progressively to encompass the closure of venues including pubs, restaurants, cafes, gyms, cinemas, public sites (e.g. libraries, museums), etc and a ban on Australians travelling overseas (with limited exceptions)⁴; new restrictions on returning overseas travellers including an enforced 14-day

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¹ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020*.

² For example, in the state of Victoria on 16 March: <https://www.premier.vic.gov.au/state-of-emergency-declared-in-victoria-over-covid-19/> (accessed 9 April 2020). Under Australia's federal structure, state and territory governments play an important role particularly in ensuring public health. Complementary emergency responses to the pandemic have been implemented through the National Cabinet (made up of federal, state and territory leaders). This article focuses primarily on the response to the COVID-19 crisis at the federal level.

³ Australian Government, Department of Health, *Social Distancing Guidance*, 15 March 2020.

⁴ Prime Minister, *Update on Coronavirus Measures*, 24 March 2020: <https://www.pm.gov.au/media/update-coronavirus-measures-24-March-2020> (accessed 9 April 2020).

isolation period⁵; and ultimately, requiring that citizens stay at home unless they need to shop for food and essential supplies, attend to medical or health needs, work or study (if this is not possible remotely) or exercise (in accordance with the limits on public gatherings of no more than two people)⁶.

These measures have already had a devastating impact on Australian businesses and workers. Early data from the Australian Bureau of Statistics show that 49% of Australian businesses have reported an adverse impact from COVID-19, and 85% expect to be impacted in coming months⁷. The enforced closure of non-essential enterprises and new travel restrictions have resulted in mass stand downs⁸ of staff, and in some instances redundancies, especially in the hospitality, retail, entertainment, tourism and aviation sectors⁹. Work in many other industries is continuing, but with major adjustments to business operations to ensure compliance with government restrictions. This includes schools, universities, professional services, media and public administration, with the implementation of work-from-home arrangements one of the major employment issues¹⁰. Workers in critical areas such as supermarkets, pharmacies, hospitals, transport, distribution centres and wider supply chains are facing different issues including greatly increased workloads and exposure to the risk of coronavirus infection¹¹.

2. Regulatory Interventions to Support Affected Businesses and Workers.

The Australian Government has implemented several economic stimulus programs since the crisis began¹². The most extensive of these is the A\$130 billion JobKeeper scheme. This enables businesses with at least 30% reduced turnover to obtain a wage

⁵ Australian Border Force, *New Arrangements for Arrivals from Overseas*:

<https://newsroom.abf.gov.au/releases/new-arrangements-for-arrivals-from-overseas> (accessed 9 April 2020).

⁶ The specific rules and exceptions for these 'Stage 3 restrictions' vary in each state and territory. See for example Victorian Government, *Coronavirus (COVID-19) restrictions Victoria*: <https://www.vic.gov.au/coronavirus-covid-19-restrictions-victoria> (accessed 9 April 2020).

⁷ Australian Bureau of Statistics, *Business Indicators, Business Impacts of COVID-19, March 2020* (Cat. No. 5676.0.55.003):

<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/5676.0.55.003Main+Features1March%202020> (accessed 9 April 2020).

⁸ 'Stand down' under Australian law is similar to the concept of 'furlough' in the UK and USA. An employer can stand an employee down where they cannot be usefully employed because of a work stoppage for which the employer cannot reasonably be held responsible (Fair Work Act 2009, section 524(1)(c)). The effect of this is that the employee remains employed but is not required to work and is not paid.

⁹ See for example Lucia Stein, 'Qantas has just stood down 20,000 staff. How can they do that?', *ABC News*, 19 March 2020; Patrick Hatch, 'Star Entertainment stands down 90 per cent of staff after casinos shut', *Sydney Morning Herald*, 25 March 2020; 'Myer announces it will close down stores and stand down 10,000 staff due to Covid-19 crisis', *The Guardian*, 27 March 2020; 'Lonely Planet shuts Australian office, staff laid off due to COVID-19', *Sydney Morning Herald*, 9 April 2020.

¹⁰ See for example ACTU Centre for Health and Safety, *COVID-19 (coronavirus): Workplace FAQs FACTSHEET* (CV01 1.3).

¹¹ For example, members of the United Workers Union took industrial action at a warehouse supplying Coles Supermarkets over COVID-19 safety concerns and 10-14 hours work-days: see Daniel Lopez, 'We Can Use this Crisis to Reconceptualize the Economy', *Jacobin*, 1 April 2020.

¹² See for example Prime Minister and Treasurer, *Economic Stimulus Package*, Joint Media Release, 12 March 2020.

subsidy of A\$1500 per fortnight, in respect of employees as at 1 March who continue working, are stood down from their employment or are re-hired if made redundant¹³. The legislation implementing JobKeeper included provisions that effectively allow employers to ask, and in some instances direct, employees to accept certain changes in employment conditions that would otherwise be impermissible under awards or enterprise agreements (e.g. a reduction in working hours to ensure the employee works only the hours equivalent to the \$1500 payment)¹⁴. The Government was originally opposed to introducing an income support program, but relented after concerted lobbying by the union movement and even some business groups¹⁵. The unions' campaigning continues, to ensure that around 2 million workers who are currently excluded can obtain access to JobKeeper payments¹⁶. The Government has also increased income support for unemployed Australians through a Coronavirus Supplement of A\$550 per fortnight¹⁷, and made child care free of charge (to support the child care sector and assist those who rely on child care to continue working)¹⁸.

Australia's regulatory framework has been adapted swiftly to enable flexible forms of engagement in several industries, including work-from-home arrangements, and to provide new forms of leave for employees who need to self-isolate. Awards regulating working conditions in the hospitality and restaurant sectors were varied by the Fair Work Commission (FWC), enabling employees to work across job classifications; and empowering employers to direct employees to work fewer hours than usual or to take annual leave on 24 hours' notice¹⁹. Similar changes have been made to the clerical award, which now includes provisions aimed at assisting employees to manage working from home at the same time as increased responsibility for children's schooling²⁰. These changes, affecting some 3 million workers, were implemented through unprecedented cooperation between trade union and business leaders²¹. In addition, the FWC has varied 103 of the 122 industry awards, inserting a new entitlement to two weeks' unpaid pandemic leave for

¹³ For further details, see Australian Government, *JobKeeper Payment: Frequently Asked Questions*, 9 April 2020. The JobKeeper scheme also covers sole traders (which includes many independent contractors).

¹⁴ *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, inserting a new Part 6-4C in the *Fair Work Act 2009*.

¹⁵ Kehoe J., *Government to pay workers' wages for coronavirus*, in *Australian Financial Review*, 28 March 2020.

¹⁶ Full-time and part-time employees are covered, along with casual employees employed on a regular and systematic basis with one employer for more than 12 months: see Australian Government, *JobKeeper Payment: Frequently Asked Questions*, 9 April 2020. This excludes many casuals who may have had regular shifts but changed employers in the 12 months before 1 March, and migrant workers (e.g. international students and those on working holiday or skilled migration visas) except for New Zealand citizens.

¹⁷ Australian Government, Services Australia, *More financial support for people affected by coronavirus*, 25 March 2020.

¹⁸ Prime Minister and Minister for Education, *Early Childhood Education and Care Relief Package*, Joint Media Release, 2 April 2020.

¹⁹ *Australian Hotels Association and United Workers Union* [2020] FWCFB 1574, 25 March 2020; *Application to vary the Restaurant Industry Award 2010* [2020] FWCFB 1741, 31 March 2020.

²⁰ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690, 28 March 2020.

²¹ Marin-Guzman D., *Hotels, unions ditch work rules for jobs*, in *Australian Financial Review*, 24 March 2020, and Marin-Guzman D., *Workers give up penalties to keep jobs*, in *Australian Financial Review*, 26 March 2020.

employees required to self-isolate who cannot access other leave entitlements²². Many employers have also voluntarily granted new forms of paid or unpaid leave to employees²³.

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²² *Application to vary awards on the initiative of the Commission* [2020] FWCFB 1760, 1 April 2020 and [2020] FWCFB 1837, 8 April 2020.

²³ ACTU, 'List of employers who have agreed to two weeks special paid leave', at: https://www.australianunions.org.au/cv_good_employers_list (accessed 9 April 2020).